IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 2, 2008 Session

MARSHA SALYER, ET AL. v. FELICIA McCURRY, ET AL.

Appeal from the Circuit Court for Washington County
No. 25038 Thomas J. Seeley, Jr., Judge

No. E2008-01017-COA-R3-CV - FILED JANUARY 29, 2009

Marsha Salyer ("Plaintiff") was interested in purchasing a house in Washington County, Tennessee. She was being shown a house by Felicia McCurry ("McCurry"), a real estate agent with Century 21 Pro Service Realtors ("Century 21"). Plaintiff and McCurry approached a closed door in the house, and Plaintiff asked McCurry what was behind the door. McCurry responded that it was a bedroom and then told Plaintiff to go on in. Plaintiff opened the door and took a step into what McCurry had told her was a bedroom. Unfortunately, the door led to a basement and Plaintiff fell down the stairs and was injured. This lawsuit followed. McCurry and Richard Chantry d/b/a Century 21 filed a motion for summary judgment claiming that Plaintiff was at least 50% at fault for her own injuries since she willingly stepped into a dark and unfamiliar area. Defendants claimed that because Plaintiff was at least 50% at fault, Plaintiff's case was barred by comparative fault principles. The Trial Court agreed and granted the motion for summary judgment. Finding a genuine issue of material fact as to whether Plaintiff was at least 50% at fault, we vacate the judgment of the Trial Court and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Michael E. Large, Bristol, Tennessee, for the Appellants, Marsha Salyer and David Salyer.

S. Curtis Rose, Kingsport, Tennessee, for the Appellees, Felicia McCurry and Richard Chantry d/b/a Century 21 Pro Service Realtors.

OPINION

Background

When the incident giving rise to this lawsuit happened, Plaintiff and her husband, David Salyer, were residents of North Carolina.[1] Plaintiff was interested in purchasing a house in Washington County, Tennessee. Plaintiff enlisted the aid of her niece, Felicia McCurry, a real estate agent who worked for Century 21. On December 16, 2005, McCurry was showing Plaintiff a house owned by Roy Crowe ("Crowe"). According to Plaintiff's complaint:

> [Plaintiff] opened one of the doors located in the aforesaid home. Upon opening the door, Plaintiff Marsha Salyer believed the door led to a room inside the home. However, the door did not lead to a room but instead led to an unlit, steep wooden staircase which descended several feet to a basement. Upon Plaintiff Marsha Salyer taking her first step, she was not able to step onto a floor and thus fell the full length of the steps severely injuring her arm, wrist, breasts and head.
>
> That Plaintiff Marsha Salyer's fall, resulting from inappropriate warning by all defendants, and failure to warn of a known hazard, and failure to keep the area properly lit for the purpose of showing the home to a prospective buyer, caused Plaintiff to suffer serious and permanent injuries including, but not limited to, a broken arm and wrist, injured breasts and head. Said broken arm and wrist necessitated surgical intervention and physical therapy. Plaintiff Marsha Salyer has suffered great pain and mental anguish and will continue to do so as a result of the aforementioned injuries.
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> The Plaintiff, Marsha Salyer, was an invitee of all defendants by virtue of the fact that Plaintiff entered . . . Roy Crowe's property, possibly to purchase said home that would have been of pecuniary value to all Defendants; Defendant Felicia McCurry while in the scope and course of her employment with Richard Chantry d/b/a Century 21 (Pro Service Realtors) as a real estate agent, invited [Plaintiff] to view the aforesaid home. Defendants are directly and proximately responsible for the injuries sustained by the [Plaintiff].
>
> That Defendant[s] owed the [Plaintiff] a duty of reasonable care for the protection of the Plaintiffs, which the Defendant[s]

[1] Although Marsha Salyer and David Salyer are both plaintiffs, for ease of reference only we will refer to Marsha Salyer singularly as "Plaintiff."

> negligently breached. The Defendant[s] knew or should have known about the dangerous conditions and foreseeable injuries of and yet Defendants made no attempt to warn Plaintiffs of the existing dangerous condition. . . . (original paragraph numbering omitted)

Plaintiff sued Felicia McCurry and Richard Chantry d/b/a Century 21, as well as the homeowner, Roy Crowe. Plaintiff sought damages of $300,000. Plaintiff's husband sought damages of $75,000 for loss of consortium.

All defendants responded to the complaint, generally denying any liability to Plaintiff. The defendants denied that any duty was owed but, if a duty was owed, they denied that the duty had been breached. The defendants also claimed that Plaintiff was responsible for her own injuries or that the negligence of Plaintiff was equal to or exceeded the defendants' negligence for comparative fault purposes.

All defendants filed motions for summary judgment. The Trial Court first granted defendant Crowe's motion for summary judgment, and thereafter granted the motion of defendants McCurry and Chantry d/b/a Century 21. As Plaintiff did not appeal the granting of summary judgment to Crowe, the grant of that motion is final and is not at issue on appeal. The sole issue on appeal is whether the Trial Court erred when it granted summary judgment to McCurry and Chantry d/b/a Century 21. Accordingly, we will discuss only the proof as to these defendants.[2]

Along with their motion for summary judgment, Defendants filed a statement of material facts with appropriate citations to the record. The statement of material facts provides as follows:

> 1. On or about December 16, 2005 plaintiffs, as potential buyers, went to the home of Roy Crowe . . . .
>
> 2. Ms. Salyer was visiting said address for the purpose of determining whether or not she should purchase the home.
>
> 3. Ms. Salyer entered the home on or about December 16, 2005 with her husband and Felicia McCurry.
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> 4. Ms. Salyer ventured out through the house to inspect and approached the basement door where she fell.
>
> 5. Ms. Salyer opened the door leading to the basement and stepped into a "pitch black" room.

[2] For the remainder of this opinion, any reference to "Defendants" refers only to Felicia McCurry and Richard Chantry d/b/a Century 21.

6. There was a light switch at the top of the stairs that Ms. Salyer could have turned on before entering the basement.

7. Ms. Salyer did not flip the light switch but stepped into a pitch black room simultaneously as she opened the door.

8. Century 21 was not the listing agency for the house which belonged to Roy Crowe.

9. Roy Crowe had contracted with Town and Country to list his house.

[10.] Felicia McCurry had never shown the house to any prospective buyers prior to the December 16, 2005 showing.

The primary crux of Defendants' motion was that Plaintiff had a duty to exercise reasonable care for her own safety and to see what was there to be seen. Defendants further argued that:

> The light on the wall was in plain view and was open and obvious. The plaintiff was, admittedly, not familiar with this house as it was her first visit and she should have acted reasonably and not stepped into a "pitch black" unknown area because such actions are a radical departure from the standard of care and are therefore not foreseeable. . . . It was not foreseeable that the plaintiff would step into a pitch black room without first ascertaining that it was safe to do so. . . .

Plaintiff responded to the motion for summary judgment and filed her own affidavit, which provides as follows:

> That sometime in 2005 my husband and I contacted Felicia McCurry, a real estate agent, to use her services in order to find a home in Tennessee.
>
> That on December 16, 2005 my husband and I met Felicia McCurry at 516 Hales Chapel Rd., Gray, Tennessee in order for Ms. McCurry to show us a home for this location.
>
> That after we entered the aforesaid home with Ms. McCurry and after several minutes elapsed, I pointed towards a door in the hallway at the aforesaid home. I asked Ms. McCurry where the door went and she said a bedroom. After she said it was a bedroom, I

> knocked on the door to see if someone was in the room. Then Ms. McCurry, standing about 10 ft. behind me said "hello, hello".
>
> Ms. McCurry had just discussed with me whether someone may be in the home resting as a day sleeper since a truck was in the driveway of the home.
>
> After knocking on what I thought was a bedroom door I asked Ms. McCurry what should I do. At this time she was looking at what appeared to be some paperwork about the house, she then said "go on in."
>
> Since Ms. McCurry, a professional real estate agent, said that it was a bedroom, I trusted her and opened the door. It was pitch black when I opened the door. I took one step reaching for a light switch. I assumed that the floor in the room was level with the hallway where I was standing since I was told by the real estate agent the room was a bedroom. My first step did not make immediate contact with anything since the stairway had no landing and I fell down several flights of stairs causing severe injuries.

Plaintiff also filed portions of McCurry's deposition testimony. According to that deposition, McCurry agreed that there was an agency relationship between herself and Plaintiff. McCurry agreed that the MLS sheet on the house provided her enough information to show the house and that as a real estate agent, she should be familiar with the features of a house she is showing.

The Trial Court granted Defendants' motion for summary judgment. Following oral argument on the motion, the Trial Court announced its decision from the bench, stating:

> [I]n *Eaton v. McLain* [891 S.W.2d 587 (Tenn. 1994),] the Court basically holds that the existence of a basement is known to most everybody. It's a very common occurrence in houses, and that that is not a dangerous condition. It's certainly not a latent dangerous condition. Certainly in this case Ms. McCurry had no greater knowledge than [Plaintiff] as to whether or not that was a bedroom door or basement door or whatever. But I agree with *Eaton v. McLain*. If you step into a room that's pitch black without ascertaining that there's a floor in front of you, you're at least 50 percent at fault.
>
> In this case, I think [Plaintiff] is probably close to a 100 percent at fault, if not 100 percent at fault. You just cannot step into

> a dark room when you don't know what's there. There might not have been any steps there, but there were steps. She stepped into a pitch black room without seeing what was there. A basement is not a dangerous condition that Ms. McCurry had knowledge of or should have had a knowledge of.
>
> The Court's going to find there is no genuine issue of material fact, and defendants are entitled to judgment as a matter of law. It's this Court's opinion that reasonable minds could not differ in this case and could only come to the conclusion that [Plaintiff] was at least 50 percent at fault. That makes moot the other issues.

Plaintiff appeals raising one issue which we restate as: Did the Trial Court improperly grant summary judgment to the Defendants when the undisputed facts demonstrate that McCurry wrongly assured Plaintiff that a closed door led to a bedroom and for Plaintiff to "go on in."[3]

Discussion

In a recent Supreme Court opinion, the Court granted permission to appeal in order "to provide further guidance regarding the application of summary judgment in this State." *Martin v. Norfolk Southern Railway, Co.*, No. E2006-01021-SC-R11-CV, ---- S.W.3d ----, 2008 WL 4922434, at *3 (Tenn., Nov. 14, 2008). The Court stated as follows:

> The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing,

[3] The Trial Court also found that the existence of a basement in and of itself was not an inherently dangerous condition. Defendants argue on appeal that this finding was correct. Since Plaintiff does not raise this as an issue, we need not address this particular issue and that finding by the Trial Court remains undisturbed.

then "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, --- S.W.3d ----, ---- (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, --- S.W.3d at ----. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

> *McCarley*, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id*.
>
> Because the resolution of a motion for summary judgment is a matter of law, we review the trial court's judgment de novo with no presumption of correctness. *Blair*, 130 S.W.3d at 763. In addition, we are required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences favoring the nonmoving party. *Staples*, 15 S.W.3d at 89.

Martin v. Norfolk Southern Railway, Co., --- S.W.3d ----, 2008 WL 4922434 at *4-5 (Tenn. Nov. 14, 2008).

The significance, or lack thereof, of the *Eaton* case to this case now before us has been given considerable attention by the parties and the Trial Court. The Supreme Court set forth the following facts in *Eaton*:

> On March 23, 1991, Pauline Eaton travelled to the home of Tammy and James McLain - her daughter and son-in-law - to spend the night. Ms. Eaton arrived at the McLains' about 6:00 p.m., and she and her daughter and son-in-law remained in the kitchen/den area of the home watching television until approximately 9:30 or 10:00. At that time, Ms. Eaton decided to go to bed. Because the McLains' daughter Melanie was spending the night at a friend's house, Ms. Eaton was advised by her daughter to sleep in Melanie's bedroom. This bedroom is located along a long, narrow hallway that connects the kitchen/den area on one end of the house to the master bedroom on the other end. Directly across the hall from Melanie's bedroom are two virtually identical doors that are adjacent to one another: the door to the right opens into a bathroom; and the door to the left opens onto a flight of stairs leading down to the basement. At the time of Ms. Eaton's stay, the lock on the basement door was inoperable.
>
> The McLains decided to go to bed about 11:00. While en route down the hallway to the master bedroom, Tammy McLain closed both the door to the bathroom and the door leading to the

> basement stairwell; she also switched off the hallway and bathroom lights.
>
> Ms. Eaton awoke about 5:00 the next morning needing to go to the bathroom. Although it was very dark when she awoke, Ms. Eaton did not turn on either the light in Melanie's bedroom or the light in the hallway as she attempted to make her way to the bathroom. Instead, she proceeded across the hall and opened the basement door, believing it to be the bathroom door, and stepped inside. Ms. Eaton fell down the stairs and sustained injuries to her elbow and back.

Eaton, 891 S.W.2d at 588-89.

In *Eaton*, the trial court entered a judgment approving a jury verdict which apportioned 40% of the fault to the plaintiff, and 60% to the homeowners. This Court reversed the judgment and dismissed the case. The Supreme Court ultimately affirmed the decision of this Court after concluding that under the facts of that case, the homeowners did not owe the plaintiff a duty. The Court stated:

> This Court has recently enunciated the proper analysis to be used in determining the scope of the duty of care in a negligence case. In *Doe v. Linder Constr. Co.*, 845 S.W.2d 173 (Tenn. 1992), we stated:
>
> > The term reasonable care must be given meaning in relation to the circumstances. [citation omitted]. Ordinary, or reasonable, care is to be estimated by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury. [citation omitted]. The risk involved is that which is foreseeable; a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable. Foreseeability is the test of negligence. If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. 'The plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote

> possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury.' [citation omitted].
>
> . . . . .
>
> The pertinent question is whether there was any showing from which it can be said that the defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused the plaintiff's injuries.

Doe, 845 S.W.2d at 178.

As indicated in *Doe*, the question of whether the McLains' general duty of care encompasses the duty to guard against the acts set forth in the complaint involves an analysis of the foreseeability of the risk to which Ms. Eaton was exposed. In other words, the issue is whether Ms. Eaton has made "any showing from which it can be said that *the defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused [her] injuries.*" *Id*. (emphasis added).

We are of the opinion that no such showing has been made. In order for the McLains to be charged with the duty to leave on the light in the hall and to lock the basement door, they must have been able to reasonably foresee that Ms. Eaton would get out of bed in total darkness, walk across the hall, and step into the basement stairwell, all without turning on any lighting whatsoever. While our holding would likely be different if no lighting had been provided or if it had been inoperative, Ms. Eaton's failure to turn on any lights, coupled with her willingness to open the door and step into an unfamiliar area, is such a radical departure from reasonable conduct under the circumstances that the McLains could not have reasonably foreseen that conduct and its consequences. To hold otherwise would necessarily cast the premises owner in the role of an absolute insurer of the social guest's safety, which is not contemplated by our negligence law. . . .

Moreover, we hold that the McLains did not have a duty to warn Ms. Eaton of the location of the stairs. Although Tennessee law provides that premises owners owe invitees the duty to warn of latent or hidden dangers, this duty does not arise if the danger is open and

> obvious. *Jackson v. Tennessee Valley Authority*, 413 F. Supp. 1050, 1056 (M.D. Tenn. 1976); *Odum v. Haynes*, 494 S.W.2d 795, 800 (Tenn. App. 1972). Because stairs descending from a hallway to a basement are a common feature of many homes, *see Alcorn v. Stepzinski*, 185 Ill. App.3d 1, 132 Ill. Dec. 901, 904, 540 N.E.2d 823, 826 (1989) and *Duckers v. Lynch*, 204 Kan. 649, 465 P.2d 945, 950 (1970), they are not inherently dangerous.

Eaton, 891 S.W.2d at 594-95 (footnote and partial citations omitted).

The present case, unlike *Eaton*, does not involve someone getting up before dawn, failing to turn on lights, and then stepping into the darkness. If Plaintiff had simply opened the door and taken that first fateful step entirely on her own volition, then *Eaton* likely would require summary judgment against Plaintiff. The facts in the present case, however, are markedly different from *Eaton*. Here, Plaintiff took an affirmative step toward her own protection when she specifically asked McCurry what was behind the door. McCurry told Plaintiff that a bedroom was behind the door and to "go on in." Relying on the information and direction provided to her by McCurry, Plaintiff opened the door and stepped into the darkness.[4] Had McCurry conveyed accurate information, then presumably the accident never would have happened. We believe that it was foreseeable from McCurry's perspective that when she told Plaintiff that there was a bedroom behind the door and to "go on in," that Plaintiff would do exactly that. Plaintiff at this summary judgment stage has made a "showing from which it can be said that the [D]efendants reasonably knew or should have known of the probability of an occurrence such as the one that caused [her] injuries." *Id.* at 594. Thus, unlike *Eaton*, there are facts here which raise a dispute as to whether McCurry was negligent and, if so, how much.

We reached the same result under different facts in *Daniels v. Davis*, No. 01A01-9702-CV-00068, 1997 WL 576342 (Tenn. Ct. App. Sept. 17, 1997), *no appl. perm. appeal filed*. In *Daniels*, the plaintiff's son remodeled his house and during that process removed a previously existing handrail. The handrail had been used in the past by the plaintiff, and when she returned to her son's house, she lost her balance going down the stairs, reached for the then non-existing handrail, and fell down the remaining stairs. We stated:

> The undisputed facts relating to Ms. Daniels's fall depict circumstances far different from those existing in *Eaton v.* [*McLain*]. The stairs in this case were used frequently to enter and leave the house, even while they were being reconstructed. Accordingly, Mr. Davis should have foreseen that the persons using the stairs might use

[4] When stating these facts, we are discussing them in the light most favorable to Plaintiff and drawing all reasonable inferences in her favor, as we are required to do at this summary judgment stage of the proceedings. *See Martin v. Norfolk Southern Railway, Co.*, --- S.W.3d ----, 2008 WL 4922434 at *4-5.

> the handrail to steady themselves. Since Mr. Davis had a duty to maintain these stairs in a reasonably safe condition, he had a duty either to provide a suitable substitute for the handrail or to warn persons using the stairs that the handrail had been removed. There is no evidence in this case that Mr. Davis provided either.
>
> The undisputed facts gleaned from the depositions of Ms. Daniels and Mr. Davis could permit a reasonable fact-finder to conclude that both Mr. Davis and Ms. Daniels were negligent. Mr. Davis negligently failed to maintain the stairs in a reasonably safe condition while he was rebuilding them; while Ms. Daniels negligently failed to watch where she was going as she descended the stairs. While Ms. Daniels's case is razor thin, we cannot conclude that the only reasonable conclusion to be drawn from the undisputed facts is that Ms. Daniels's negligence was greater than Mr. Davis's negligence. Since we cannot conclude as a matter of law that the negligence attributable to Ms. Daniels outweighs the negligence attributable to Mr. Davis, we conclude that the trial court erred by granting the summary judgment in this case. Under the facts of this case, comparing the fault of Mr. Davis and Ms. Daniels should be left to the jury.

Daniels, 1997 WL 576342, at *3.

We reach the same result in this case. We are unable to conclude that the only reasonable conclusion that could be drawn from the undisputed material facts is that Plaintiff's negligence was equal to or greater than McCurry's. Because we are unable to conclude as a matter of law that Plaintiff's negligence is equal to or outweighs McCurry's negligence, the Trial Court erred when it granted Defendants' motion for summary judgment. Comparing fault between Plaintiff and McCurry "should be left to the jury." *Daniels*, 1997 WL 576342, at *3.

Conclusion

The judgment of the Trial Court is vacated, and this cause is remanded to the Trial Court for further proceedings consistent with this opinion and for collection of the costs below. Costs on appeal are taxed to the Appellees, Felicia McCurry and Richard Chantry d/b/a Century 21 Pro Service Realtors, for which execution may issue, if necessary.

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D. MICHAEL SWINEY, JUDGE